United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

76-2098

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

PEDRO ARROYO and CHRISTOPHER McCORMACK,

Plaintiffs-Appellants,

-against-

PETER M. SCHAEFER, Former Deputy Warden in Command, Manhattan House of Detention; RALPH SUMOWITZ and PATRICK MAGNER, Assistant Deputy Wardens; KENNETH FERGUSON, CONSTANTINE MELLON and PAUL FELTMAN, Captains; JOSEPH OCHMAN and ROY SCHUH, Correction Officers; and DR. KARP, Institutional Physician,

Defendants-Appellees.

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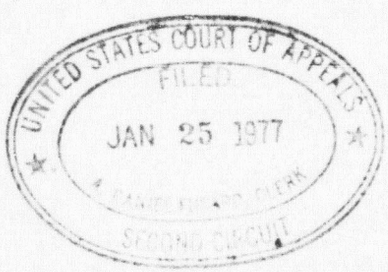

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PETITION FOR REHEARING

Pedro Arroyo and Christopher McCormack, plaintiffs-appellants herein, respectfully petition this Court (Moore, Feinberg and Gurfein, JJ.) for a rehearing, pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure, of its decision rendered on January 11, 1977 (attached as Appendix A).

Plaintiffs brought a 28 U.S.C. §1983 action in the United States District Court for the Southern District of New York, alleging that their right to be free from cruel and unusual punishment was violated when tear gas was used on the floor of the Tombs where they were confined. They sued Department of Correction officials who forced them to remain in nearby locked cells, in a poorly ventilated jail, and endure the effects of the gas. After plaintiffs presented

their case to the jury, the District Court (Knapp, J.) dismissed the amended complaint because, viewing the evidence most favorably to plaintiffs for the purposes of defendants' motion to dismiss, he found that plaintiffs had not established, as a matter of law, the liability of the individual defendants.

This Court affirmed Judge Knapp's decision, ruling that CN gas, which was used here, can not cause serious or lasting injury; that Judge Knapp could properly have concluded that plaintiffs' testimony was contrived; and that since the decision to use gas was justified, there was no constitutional violation in defendants' failure to provide assistance to plaintiffs after the gas was used.

Plaintiffs respectfully urge that this Court's decision be reconsidered because the following matters of fact and law were overlooked or misapprehended:

I. CN gas, which was used against petitioners, is readily capable of causing serious injury and death.

II. The Court's analysis of the credibility of plaintiffs' witnesses was inappropriate. The District Court did not and could not properly rely on their credibility in its ruling upon the motion to dismiss at the close of plaintiffs' case.

III. Assuming arguendo that the decision to use gas was not in error, the Court overlooked the lengthy

period of unnecessary exposure to the gas to which plaintiffs were subjected after the emergency ended. This needless exposure alone violates their rights under the standard of Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974).

I. CN GAS IS LETHAL.

This Court incorrectly assumed that CN gas is "hardly the stuff of which serious injury is made." (Slip op.* at 1321.) This statement is contrary to the record, and to a substantial body of medical and scientific evidence. CN gas, when used indoors as it was here, is extremely dangerous and can cause death.

The Court mistakenly asserts that plaintiffs' medical expert "did not say that exposure to this type of tear gas was likely to have lasting effects." (Slip op. at 1319.) To the contrary, Dr. Peter Schnall testified about CN gas as follows:

> When it comes in contact with the skin it can cause first and second degree burns. If it is ingested into the body it can cause serious liver damage and irregularities of the heartbeat, and it can cause the heart to stop functioning, under high concentrations. (T**at 67.)

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*"Slip op." denotes the Court of Appeals opinion of January 11, 1977.

** "T" denotes the trial transcript, which is filed in this Court as the Supplemental Record.

Dr. Schnall noted that "tear gas has a cumulative toxic effect with time", (T at 83) so that prolonged exposure to even low concentrations of CN can result in serious injury or death:

> Prolonged exposure in which one is breathing the tear gas for periods greater than five, ten or 20 minutes, depending on the concentration, can cause a burning reaction in the lung. This is the most dangerous aspect about prolonged exposure to tear gas, the way it burns your eyes and burns your throat, it burns the lungs.
>
> Prolonged irritation will cause the lung to start weeping fluid, pulmonary edema. If this is untreated it could be lethal....(T at 81.)

Despite Dr. Schnall's testimony, this Court on appeal appears to have taken judicial notice that CN gas is not harmful. This assumption is incorrect. There is ample evidence that tear gas, used indoors in relatively small quantities, can cause death. Indeed, the New York City Board of Correction has reported four recent deaths in the New York area which were caused by the indoor use of CN gas.* Three of the victims were prisoners. Four other deaths from the indoor use of CN were reported in "Chloracetophenone (Tear Gas) Poisoning: A Clinico-Pathologic Report", Stein and Kirwan, Journal of Forensic Sciences, July 1964 at 374.

This Court's incorrect statements about the harmlessness of CN gas have ramifications beyond this case. Several cases

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* "The Death of John Wesley Thompson", The New York City Board of Correction, January 29, 1976.

are currently pending before the district courts in this Circuit which concern incidents of indoor CN use resulting in death. (Robinson v. Ward, 76 Civ. 3178, S.D.N.Y.; Landy v. Malcolm, 75 C 946, E.D.N.Y.) This Court's opinion can be read by prison officials as a carte blanche for the virtually unrestrained use of this lethal gas.

II. THE CREDIBILITY OF PLAINTIFFS' WITNESSES SHOULD NOT HAVE BEEN CONSIDERED BY THIS COURT.

This Court stated that "Judge Knapp could properly conclude, on the basis of the plaintiffs' case, that the testimony was contrived." (Slip op. at 1321.) However, Judge Knapp did not base his decision on any evaluation of plaintiffs' credibility. (T at 209-11.) Indeed, he recognized that such evaluations were "irrelevant" to a determination of defendants' motion to dismiss at the close of the plaintiffs' case. (T at 209.)

The standard to be applied both at trial and on appeal in determining such a motion for dismissal, has been stated as follows:

> In determining whether the evidence is sufficient the court is not free to weigh the evidence or to pass on the credibility of witnesses or to substitute its judgment of the facts for that of the jury. Instead it must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence.

Wright and Miller, Federal Practice and Procedure: Civil §2524. See also, Brady v. Southern R.R., 320 U.S. 476 (1943). This Court's view that plaintiffs' evidence may have been contrived should not have been used as a basis for affirmance.

III. PLAINTIFFS' PROLONGED EXPOSURE TO CN GAS AFTER AN EMERGENCY ENDED CONSTITUTED A VIOLATION OF THEIR RIGHTS.

A crucial facet of plaintiffs' case was that defendants violated their rights under 28 U.S.C. §1983 by forcing them to remain in their cells after the tear gas was used on an obstreperous inmate, Hughes, and he was removed from the area. This Court's opinion focuses only on the decision of corrections personnel to use gas against Hughes, and completely overlooks the prolonged and unnecessary exposure to tear gas which plaintiffs were forced to suffer after the emergency ended. This needless exposure to a dangerous gas in itself violated plaintiffs' rights.

As noted in Appellants' Brief, after Hughes was removed from the area, plaintiffs and the other fifth floor inmates pleaded to be let out of their cells and removed from the area. Their pleas were ignored by the officers and they were forced to remain in their cells for up to two hours. Even when released from their cells, they were not permitted to leave the immediate area, take showers, or see a doctor, nor were the section's windows opened although there were problems with the Tombs' ventilating system. (Appellants' Brief, at 5-6.)

As this Court noted (slip op. at 1319), Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974) is the controlling case here. Williams held that an isolated omission to act by a prison guard is actionable when the circumstances of the omission indicate deliberate indifference to the inmate's needs. In the instant case, where corrections personnel permitted the plaintiffs to endure continued needless suffering long after the emergency had ceased, the Williams test was clearly met.

CONCLUSION

Plaintiffs respectfully submit that this Court was mistaken in finding that CN gas is not dangerous, and in considering the credibility of plaintiffs' witnesses. This led the Court to conclude incorrectly that unnecessary prolonged exposure to the gas is not a constitutional violation. A rehearing is necessary to correct these misapprehensions of fact and law, and to reverse the decision of the District Court.

WHEREFORE, petitioners respectfully request that a rehearing be granted.

Dated: New York, New York
January 25, 1977

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-against- :

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Defendants-Appellees. :

#76-2098

AFFIDAVIT OF SERVICE

- -X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ROBERT B. SHAPIRO, being duly sworn, deposes and says that on January 25, 1977, I served a copy of the within Petition For Rehearing by mailing via United States mail, postage prepaid, a true and correct copy of same to the attorney for Defendants-Appellees, W. Bernard Richland, Corporation Counsel, Municipal Building, New York, New York 10007.

Robert B Shapiro

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Sworn to before me this
25th day of January, 1977

Ellen J. Winner

Notary Public

ELLEN J. WINNER
NOTARY PUBLIC, State of New York
No. 41-0027168
Qualified in New York County
Commission Expires March 30, 1977

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 484—September Term, 1976.

(Argued December 2, 1976 Decided January 11, 1977.)

Docket No. 76-2098

PEDRO ARROYO and CHRISTOPHER McCORMACK,

Plaintiffs-Appellants,

—against—

PETER M. SCHAEFER, Former Deputy Warden in Command, Manhattan House of Detention; RALPH SUMOWITZ and PATRICK MAGNER, Assistant Deputy Wardens; KENNETH FERGUSON, CONSTANTINE MELLON and PAUL FELTMAN, Captains; JOSEPH OCHMAN and ROY SCHUH, Correction Officers, and DR. KARP, Institutional Physician,

Defendants-Appellees.

Before:

MOORE, FEINBERG and GURFEIN,

Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Knapp, *D.J.*, dismissing a complaint seeking damages for alleged violations of 42 U.S.C. § 1983 after the plaintiffs had presented their case in a trial before a jury.

Affirmed.

MARJORIE M. SMITH, New York, N.Y. (William E. Hellerstein and The Legal Aid Society, New York, N.Y., of Counsel), *for Plaintiffs-Appellants.*

L. KEVIN SHERIDAN, New York, N.Y. (W. Bernard Richland, Corporation Counsel, New York, N.Y., of Counsel), *for Defendants-Appellees.*

GURFEIN, *Circuit Judge:*

This is an appeal from an order of the District Court for the Southern District of New York, Knapp, *D.J.*, dismissing a complaint seeking damages for alleged violations of 42 U.S.C. § 1983 after the plaintiffs had presented their case in a trial before a jury.

The plaintiffs-appellants[1] were pretrial detainees in the Manhattan House of Detention for Men (the "Tombs") at the time of the incident alleged. The defendants-appellees are the former Deputy Warden, two Assistant Deputy Wardens, three Captains, two Correction Officers and a prison physician.[2] After plaintiffs filed their complaint *pro se*, the District Court appointed the Legal Aid Society Prisoners' Rights Project to represent them.

I

The basis of plaintiffs' § 1983 claim is an incident in the Tombs in September, 1972. It involved the efforts of prison authorities to return another detainee, Hughes, to his cell. The particulars of the incident were supplied by the testimony of the two appellants.

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1 There were originally four plaintiffs. The complaint was dismissed as to two of them for failure to prosecute. They have not appealed.

2 Appellants have not appealed from the dismissal of the complaint as to the Commissioner of Corrections and the Warden of the Tombs.

While the detainees were confined to their cells for a "lock-in" period, Hughes was mistakenly allowed to leave his cell. He was supposed to remain inside his cell throughout the day for punitive reasons. He had been moved from punitive segregation to appellants' section of the prison because he had made trouble for the other prisoners in punitive segregation. Appellant McCormack acknowledged that Hughes was a "trouble-maker," had a reputation "for getting tough" and was in the habit of throwing objects, especially broomsticks, at others in the prison.

Hughes refused the order of a correction officer to return to his cell, as he had refused to do in the past. A Captain came and talked to Hughes for five to ten minutes in an effort to persuade him to go back into his cell.

Other officers appeared in the area, some of whom had tear gas dispensers. When the detainees on the floor observed these other guards, Arroyo and McCormack testified that everyone asked to be let out to avoid the gas. Although McCormack testified that the inmates wanted to get out to help the guards put Hughes back into his cell, Arroyo testified that some detainees wanted to get out to help Hughes. In any case, "everyone was talking, making noise, and discussing" and "screaming trying to get out of the cells."

Hughes, in the meantime, "got together a few household utensils that he was going to use in his defense . . . [and] was prepared to make his stand . . ." A correction officer began to discharge tear gas dust at Hughes. Hughes dodged the dust and the officer in redirecting his aim dispensed a total of three bursts. With the aid of other officers Hughes was subdued.

The dispenser was equipped to discharge for a total of ten seconds, in one-second bursts if desired. McCormack testified that each of the three bursts lasted from three to

five seconds and described the scene following the discharge of the dust as follows:

> ". . . we were choking and everyone was trying to get towels, and to, you know, trying to avoid all this discomfort and at the same time there was a lot of confusion. Everybody is panicking. We were asking to be let out ourselves. The officers and everything, they were going about dragging Mr. Hughes out."

After the incident the detainees testified that they had asked to be let out of their cells and removed from the area. Nevertheless, they remained in their cells for 45 minutes up to two hours after the incident. When they were permitted to leave their cells, they were not permitted to leave the immediate area. The shower in appellants' section was broken. Arroyo was told by an officer that they could not go to another section to take a shower because there was only one shower in that section and it was in use.

After the incident, nurses were in the section dispensing medication. Appellants testified that they asked the nurses for medical help, but were not treated for tear gas effects. It was established without contradiction that the nurses themselves wore no protection, such as gas masks. The next shift of guards, however, were said to have worn gas masks. McCormack himself acknowledged that the prison authorities after the incident might have placed fans in the section.

Plaintiffs' expert witness was a doctor who was a member of the Medical Committee for Human Rights and who had treated about two dozen persons in various demonstrations throughout the country. He testified that CN was not really a gas but a dust like talcum powder, and that it can be irritating to the moist membranes of the body, eyes, nose, throat and the lining of the respiratory tract.

He gave it as his opinion that people exposed to it should be removed from the area. The experience of tear gas inhaling he said can be very "frightening." The expert did not say that exposure to this type of tear gas was likely to have lasting effects.

II

The amended complaint charges that "[d]efendants unnecessary and indiscriminate use of tear-gas and their failure to take subsequent measures to reduce or limit the impact of the gas upon plaintiffs deprived plaintiffs of their right to be free from cruel and unusual punishment as guaranteed by the Eighth Amendment and of their right to be free from the infliction of harm without due process of law as guaranteed by the Fourteenth Amendment." The District Court, in an oral opinion, after the plaintiffs had presented all their evidence, as we have seen, dismissed the amended complaint as to all defendants.

The test of an Eighth Amendment violation of a prisoner's rights was set forth in *Williams* v. *Vincent*, 508 F.2d 541 (2d Cir. 1974), as "conduct which 'shocks the conscience.'" There must be present "circumstances indicating an evil intent, or recklessness, or at least deliberate indifference to the consequences of his conduct for those under his control or dependent upon him." 508 F.2d at 543-44, 546.

Recently the Supreme Court in *Estelle* v. *Gamble*, —— U.S. ——, 45 U.S.L.W. 4023 (Nov. 30, 1976), cited *Williams* in its formulation of a similar standard under the Eighth Amendment in § 1983 actions. There Mr. Justice Marshall stated:

> "[I]n the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute a "wanton infliction of unnecessary pain" or to be "repugnant to the conscience of mankind." . . .

> Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. *In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.*"

45 U.S.L.W. at 4025-26. (Emphasis added).

While the Eighth Amendment may not, strictly speaking, be applicable to pretrial detainees, as Judge Friendly noted in *Johnson* v. *Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973), due process requires no more in this context.[3]

Under either constitutional provision, plaintiffs must establish more than a common law tort violation. In *Johnson* v. *Glick*, *supra*, which also involved pretrial detainees, this court applied the *Rochin* test and discussed the nature of the detainees' constitutional protection:

> "Certainly, the constitutional protection is nowhere nearly so extensive as that afforded by a common law tort action . . . . The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force. Not every push or shove, even if it may later seem unnecessary in the peace of the judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the

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3 In formulating the Eighth Amendment standard in *Estelle*, *supra*, Mr. Justice Marshall used the test of conduct "repugnant to the conscience of mankind" which he specifically noted was the due process test used in *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring) and *Palko* v. *Connecticut*, 302 U.S. 319, 323 (1937) (Cardozo, J.). 40 U.S.L.W. at 4025. And this court in *Williams* v. *Vincent*, *supra*, used the due process test of *Rochin* v. *California*, 342 U.S. 165 (1952), "conduct that shocks the conscience." 508 F.2d at 543-44.

need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." 481 F.2d at 1033.

III

The almost reflex action of prison guards in dealing with prisoners or detainees in emergencies cannot be equated with patterns of misconduct that are deliberate matters of policy. The prison authorities here were suddenly confronted with an obstreperous inmate to whose aid others might come if released from their cells. The avoidance of a riot that might be difficult to quell is surely a *desideratum* of a reasonable prison administration. To be sure, emergency does not excuse irresponsibility. Thus, if bullets had been fired in a fashion so indiscriminate as to inflict bodily harm on innocent inmates, the civil rights issue would be different. Here the tear gas of the lowest order of danger, CN, so often used to dissipate riots, is hardly the stuff of which serious injury is made. Considering that there was no calculated harm, the emergency condition insulates the prison officials against an accusation of callous disregard such as would support a claim of deprivation of constitutional right. Permitting the nurses to appear without protective gas masks accents the point.

Judge Knapp could properly conclude on the basis of the plaintiffs' case that the testimony was contrived. The effect of the tear gas was not very strong. McCormack conceded that he felt no burning sensation on his skin. Though McCormack complained of vomiting, the plaintiffs' own expert conceded on the basis of McCormack's testimony that the gas level was "quite low" and would not

cause the vomiting of which McCormack complained. Though McCormack testified that he had a nosebleed as well, the same expert testified that tear gas never causes nosebleeds.

When Arroyo visited Bellevue Hospital a few days later, he did not complain of burns, nor did the doctors notice any. Though Arroyo testified that the "dust" hit him directly in the face (though the gas was emitted by something like an "oversized can of hair spray" highly localized in effect), he, nevertheless, continued to watch the scene instead of moving back to avoid the gas.

The nurses who allegedly refused medical attention to the plaintiffs wore no masks themselves, as we have seen, and none of the nurses was identified or made a defendant. Nor was there any evidence that the nurses, if request was indeed made to them for medical treatment, ever reported the request to any of the defendants.

Finally, the plaintiffs failed to establish a callous or shocking disregard of their well-being by any of the particular named individual defendants. *Respondeat superior* is not a doctrine that is applicable to § 1983 actions. *Williams* v. *Vincent, supra; Johnson* v. *Glick, supra.* In this case, there was no evidence that any of the defendants was informed that the inmates requested medical treatment or that medical treatment was necessary. The initial use of tear gas of this low quality was, as we have seen, justified by the nature of the emergency. Since Judge Knapp saw clearly that allowing a verdict for the plaintiffs would amount to a miscarriage of justice, he quite properly dismissed the complaint on the plaintiffs' case for not amounting to a minimum constitutional violation.

Affirmed.

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